Alcoa, Inc. *and* Local 115A, United Steelworkers, AFL–CIO–CLC, a/w United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL–CIO–CLC. Cases 25–CA–29487, 25–CA–29611, 25–CA–29649, 25–CA–29701, and 25–CA–29860

August 29, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On July 28, 2006, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief,[1] and the Respondent filed a reply brief; the General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[2]

Introduction

As discussed below, we reverse the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its leave policy to prohibit unit employees from taking unpaid leave to attend monthly union meetings. In addition, we reverse the judge's findings of independent violations of Section 8(a)(1), which were based on his determination that all of the measures the Respondent took to enforce its new leave policy violated the Act. We also reverse the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by contracting out the Total Predictive Maintenance (TPM) event at its facility in April 2005.[3] In addition, we reverse the judge's finding that the Respondent did not violate Section 8(a)(3) and (1) of the Act when it suspended Mark Hewitt for 3 days for using profanity during an August 4 disciplinary meeting. We affirm the judge's finding, but on a different rationale than the judge applied, that the Respondent violated Section 8(a)(3) and (1) by suspending Hewitt for an additional 27 days for his profane comments.[4]

I. THE RESPONDENT'S CHANGE IN LEAVE POLICY

A. Factual Background

The Respondent processes aluminum products at its facility in Lafayette, Indiana. The Respondent has had a longstanding collective-bargaining relationship with the Union. For a number of years, the Respondent permitted unit employees working on the first shift (7 a.m. to 3 p.m.) to clock out up to 2 hours early to attend a monthly union meeting, which was held from 1:30 to approximately 3 p.m. Employees who attended this union meeting were not paid for their time off from work, but the Respondent considered the time off to be an excused absence. Some employees started work early so that they could work the full shift and attend the meeting. Prior to June 21, an employee was only required to notify his or her supervisor on the day of the meeting that he or she was going to be leaving early, or the day before if the employee was working a flexible schedule.[5]

In early 2005, the Respondent was experiencing high demand for its products, and its management determined that over 2100-man hours of production were being lost due to employees leaving work early for the monthly meeting. At a meeting on March 8, Pamela Leonard, the human resources manager for the Respondent's Lafayette facility, advised Gerald Misner and Spencer Buchanan, the union president and vice president, that the Respondent's policy of excusing employees to attend the Union's meetings during working time was costing the plant valuable man hours. Leonard asked the Union to submit alternatives to the current practice, such as holding multiple meetings or changing meeting times. Misner told Leonard that Leonard was "rocking the boat" and asked her if she wanted to negotiate about this change. Leonard replied that she did not have to do so. Misner then

[1] The General Counsel argues that the Respondent's exceptions and supporting brief fail to comply with Sec. 102.46 of the Board's Rules and Regulations. We find that the Respondent's exceptions and brief are in substantial compliance with the Board's Rules.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

We shall modify the judge's recommended Order to conform to the violations found. We shall also substitute a new notice to conform to the Order as modified.

[3] All dates are in 2005, unless otherwise noted.

[4] We find it unnecessary to pass on whether the Respondent's actions with respect to Hewitt also violated Sec. 8(a)(4), because the remedy for that violation would be essentially the same as the remedy for the 8(a)(3) violation. See *United Parcel Service,* 327 NLRB 317 fn. 4 (1998), enfd. 228 F.3d 772 (6th Cir. 2000). There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing and refusing to provide requested relevant information to the Union.

[5] There is no assertion that the Respondent's policy of considering an employee's attendance at the monthly union meeting to be an excused absence was covered under the collective-bargaining agreement or that the collective-bargaining agreement contained a zipper clause.

stated that the Respondent's policy of excusing employees to attend the meetings during working time had become part of the Respondent's attendance policy and the Union did not want to bargain about the issue at that time.

On March 31, Leonard reiterated her request to Misner "for a proposal on or alternative to shutting down equipment to excuse employees to leave work to attend these meetings . . . ." Misner replied on April 8, requesting information concerning the man hours lost due to employees leaving work early for the meetings. Leonard responded by providing a list of equipment that the Respondent claimed had been shut down while employees attended the most recent meeting. During a meeting on April 28, Leonard, for the third time, requested that Misner submit a proposal regarding the union meetings. Misner replied that the Union's proposal was to leave the union meeting schedule alone. The following day, Misner confirmed this response in writing.

On May 18, Leonard told Misner that effective June 1, the Respondent would discontinue its practice of excusing employees from work to attend the monthly union meetings. Leonard also restated her position that this issue was not a mandatory subject of bargaining. The Respondent subsequently posted a notice to employees stating that attendance at union meetings would no longer be excused. On June 20, the Respondent circulated a letter signed by Plant Manager Robert Morrison repeating this new policy and advising employees that Morrison had learned of rumors of a mass walkout on June 21, the date of the Union's monthly meeting. The letter informed employees that the Respondent might consider leaving the plant without permission on June 21 to constitute insubordination, as well as a violation of the parties' collective-bargaining agreement. It further noted that employees could face discipline up to and including discharge if they violated the new policy. On June 21, some supervisors warned employees that they could face discipline if they left early that day. In addition, some supervisors stood by the timeclocks to record which first-shift employees left work early. On June 23, management questioned two employees, Mark Hewitt and James Howard, regarding their reasons for leaving work early on June 21. Approximately 10–12 employees attended the union meeting on June 21. On previous occasions, 25–60 employees had attended.

B. Judge's Decision

The judge found that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing its leave policy to prohibit unit employees from taking unpaid leave to attend the monthly union meetings. The judge reasoned that leave or attendance policies are mandatory subjects of bargaining and therefore the Respondent was required to bargain over its decision to prohibit employees from taking unpaid leave to attend the union meetings. The judge found that the Respondent's change in policy was material and substantial because it prevented union members who wanted to attend the monthly meetings from being able to discuss the terms and conditions of their employment with other unit employees. The judge concluded that the Respondent did not bargain over this issue because it did not offer the Union anything, but simply asked the Union to change the way its meetings were held. The judge further found that the Respondent did not notify the Union prior to implementing the change in its leave policy, but, on May 18, simply announced that unit employees on the first shift could no longer take unpaid leave or work a flexible schedule on the day of the union meetings.

Based on this violation, the judge further found that the Respondent violated Section 8(a)(1) by (1) threatening unit employees with discipline if they left the Respondent's facility early on the first shift on June 21; (2) informing employees that it would engage in surveillance to determine who was leaving early on that date, and by engaging in surveillance on June 21; and (3) interrogating Mark Hewitt and Jim Howard as to why they left the facility early on June 21. The judge reasoned that all of the Respondent's actions in enforcing its unilateral change in its leave policy violated the Act. We reverse the judge and dismiss each of these complaint allegations.

Analysis

Section 8(a)(5) of the Act requires an employer to provide its employees' representative with notice and an opportunity to bargain before instituting changes in any matter that constitutes a mandatory bargaining subject. *NLRB v. Katz*, 369 U.S. 736 (1962). A unilateral change with regard to a mandatory subject of bargaining violates Section 8(a)(5) and (1) if the change is "material, substantial, and significant." *Crittenton Hospital*, 342 NLRB 686 (2004). Leave or attendance policies have long been held to be mandatory subjects of bargaining. E.g., *Dorsey Trailers, Inc*., 327 NLRB 835, 852 fn. 26 (1999), enfd. in relevant part 233 F.3d 831 (4th Cir. 2000); *Ciba-Geigy Pharmaceutical Division,* 264 NLRB 1013, 1016 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983).

We agree with the judge that the Respondent had a past practice of allowing employees to take unpaid leave to attend the monthly union meetings, that this practice had become part of their terms and conditions of employment, and that the Respondent's change to this practice was material, substantial, and significant. However, contrary to the judge, we find that the Respondent met its

obligation to timely notify the Union of its desire to change its leave policy and to offer the Union an opportunity to bargain.

Where a union receives timely notice that an employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter. To be timely, the employer's notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable and meaningful opportunity to bargain. *Ciba-Geigy Pharmaceutical Division*, supra. Here, through a series of communications well in advance of the change, the Respondent clearly signaled to the Union that the current leave policy could not continue. In March, Leonard told Misner that she was concerned about losing 2100-man hours of production and invited the Union to explore alternatives to the Respondent's practice of allowing employees to take unpaid leave to attend the monthly union meetings. Between March and May, Leonard asked Misner three times to submit proposals and to explore other options, such as holding multiple meetings. The first time, Misner specifically told Leonard that the Union did not wish to bargain at that time.[6] The second time, Misner asked for documentation of the lost man hours, and Leonard responded that same day with a list of equipment that had been shut down to excuse employees to attend the prior month's union meeting. After receiving this information, Misner made no request to bargain. The third time, Misner made it clear that the Union did not intend to bargain over this issue; rather, he stated that the Union's proposal was to leave the union meeting schedule alone. Only then did the Respondent announce the new leave policy.

The judge reasoned that the Respondent failed to bargain because it did not offer anything to the Union, but merely asked the Union to change the way it held its meetings. Contrary to the judge, the Respondent had no duty to initially offer substantive concessions; its duty was merely to give the Union adequate notice and an opportunity to bargain, a duty we find that it met. The Respondent informed the Union of its problem, promptly complied with the Union's request to present supporting documentation of lost man hours, and sought, three times, "a proposal on or alternative to" shutting down its equipment. Despite this, the Union offered nothing. That an end to the unpaid leave practice was imminent was clear from the totality of Leonard's communications to the Union: her expressed concern about lost production, her eagerness to document that concern in response to the Union's information request, and her repeated requests to the Union to propose some alternative to the current arrangement that would not require an equipment shutdown. Under these circumstances, we find that the Respondent met its duty to put the Union on notice of the impending change to its leave policy and to give the Union an opportunity to bargain. Thus, we find that the Respondent did not violate Section 8(a)(5) and (1) by changing its leave policy to prohibit unit employees from taking unpaid leave to attend the monthly union meetings.

Having so found, we also reverse the judge's findings of independent violations of Section 8(a)(1), all of which were based on his determination that all of the measures that the Respondent took to enforce its new leave policy violated the Act. Thus, we dismiss both the 8(a)(5) and the independent 8(a)(1) allegations centering on the Respondent's discontinuance of its practice of excusing employees to attend the Union's monthly meetings.

II. THE RESPONDENT'S SUBCONTRACTING OF TPM WORK

A. Factual Background

In the spring of 2005, the Respondent conducted its first TPM event at the Lafayette facility. This maintenance work consisted of a comprehensive cleaning, inspection, and repair of the 5-inch drive shaft cell in the tube mill. The Respondent proposed to the Union that in addition to bargaining unit employees, supervisory personnel, including supervisors from other Alcoa facilities, perform some of the work. The Union, by Misner, rejected the Respondent's proposal and proposed that bargaining unit employees perform all of the work, which was scheduled for a weekend, and that the Respondent offer the employees overtime. The Respondent decided to contract out the work. The parties' collective-bargaining agreement permits the Respondent to subcontract this work.

B. Judge's Decision

The judge found that the Respondent violated Section 8(a)(3) and (1) in contracting out the TPM event to retaliate against the Union for its insistence that bargaining unit employees perform bargaining unit work. In so concluding, he found, inter alia, that the Respondent "bore animus towards the Union" because of the Union's refusal to permit supervisors to do the TPM work or to propose an alternative schedule for the monthly union meetings. The judge further rejected the Respondent's

[6] Leonard's statements that the Respondent's practice of excusing absences for union meetings was not a mandatory subject of bargaining do not establish that the Respondent refused to bargain. Notwithstanding her statements, the Respondent repeatedly solicited the Union's proposals, and there is no evidence that the Respondent would not have considered any alternatives the Union might have provided.

Wright Line[7] defense that the work could not be done solely by bargaining unit employees without hurting production.

Analysis

We disagree with the judge and dismiss this complaint allegation. Under *Wright Line*, 251 NLRB at 1083, the General Counsel must first prove, by a preponderance of the evidence, that protected or union conduct was a motivating factor in the employer's adverse action. Once the General Counsel makes a showing of discriminatory motivation by proving protected activity, employer knowledge of the activity, and animus against it, the burden of persuasion shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. 251 NLRB at 1089. Here, the General Counsel has not met his initial burden under *Wright Line* of establishing that the Respondent's decision to contract out the TPM work was unlawfully motivated. While the record establishes that employees engaged in protected activity and that the Respondent was aware of it, there is no evidence to support the judge's finding that the Respondent harbored animus towards protected activity.

The judge inferred animus from what he deemed a lack of "first hand evidence that the decision to contract out the TPM event" could be attributed to anything other than the Union's refusals to accede to the Respondent's proposals. To supply the missing animus element of the General Counsel's case, he relied on what he considered insufficient evidence of nondiscriminatory business reasons. We decline to make that inference. First, the timing of the subcontracting decision undercuts that inference. The decision was actually made *before* the Union stated its final position that it would not propose alternatives to the monthly union meeting. Second, the Respondent had a contractual right to subcontract this work, so that the mere fact that it did so after the Union's refusals to permit supervisors to do the TPM work (or to propose an alternative schedule for the monthly union meetings), does not establish that the subcontracting decision was intended as a reprisal for those refusals. This is particularly true in the context here of the parties' long history of bargaining and the absence of any evidence to suggest that the bargaining relationship has been other than harmonious. Accordingly, we dismiss this allegation.

[7] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

III. THE RESPONDENT'S SUSPENSION OF MARK HEWITT

A. Factual background

Mark Hewitt has worked as a crane operator in the Respondent's tube mill department for 27 years. Hewitt is the financial secretary of the Union, also serving on the Union's safety committee and as a steward for the tube mill department. On August 4, bargaining unit employee Kevin Cripe asked Hewitt to represent him at a disciplinary meeting. Doug Foster, who supervised both Cripe and Hewitt, and Managers Donald Thomas and Scott Burnett attended the meeting on the Respondent's behalf. Phyllis Parks, a unit employee and a union tube mill committee person, also attended the meeting. Hewitt arrived at the meeting after it started.

The Respondent discussed disciplining Cripe for an incident that involved Cripe's use of profanity to Foster. After Hewitt arrived, he urged Foster to be lenient in disciplining Cripe, but Foster indicated that he thought a suspension was appropriate. Hewitt then pointed at Foster, who was sitting across a table from him, and said, "If you tell this egotistical f—er to quit talking to people the way he does, this wouldn't happen." Thomas cut Hewitt off and later that day issued Hewitt a 3-day suspension for insubordination and abusive and offensive behavior to a supervisor. The next day, Thomas issued Hewitt a 27-day suspension for a total of 30 days without pay. The Respondent based the additional 27 days on the fact that Hewitt had previously received an oral counseling on May 5 for using the same profanity over the radio when complaining about the way maintenance employees had attached a motor to his crane.

B. Judge's Decision

The judge found that the Respondent did not violate Section 8(a)(3) and (1) in suspending Hewitt for the initial 3 days. The judge explained that although Hewitt was engaged in Section 7 activity when he made the remark for which he was suspended, Hewitt lost the protection of Section 7. Applying *Atlantic Steel Co.,* 245 NLRB 814 (1979), the judge reasoned that Hewitt's outburst was not provoked by an unfair labor practice. The judge further observed that Hewitt's outburst was unwarranted and occurred in a grievance hearing that concerned Cripe's alleged insubordinate use of profanity toward Foster, who was both Cripe's and Hewitt's supervisor. Thus, the judge concluded that Hewitt's outburst would undercut Foster's authority and his objective in disciplining Cripe for his use of profanity. The judge further found, however, that Hewitt's additional 27-day suspension was

unlawful under a *Wright Line* analysis. For the reasons set out below, we find that the entire 30-day suspension was unlawful.

Analysis

Because it is undisputed that Hewitt's discipline was precipitated by his conduct at the August 4 meeting, the appropriate analysis is whether the conduct for which he was disciplined was initially protected under the Act and, if so, whether he lost that protection at any point. See *Hahner, Foreman & Harness, Inc*., 343 NLRB 1423, 1425 fn. 8 (2004).[8] It is clear that Hewitt was acting in his representative capacity as shop steward when he confronted Foster, and that he was engaged in protected conduct at the time. To determine whether an employee who is otherwise engaged in protected activity loses the protection of the Act due to opprobrious conduct, the Board considers the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was in any way provoked by an employer's unfair labor practice. *Atlantic Steel*, 245 NLRB at 816. Applying these factors, we find that Hewitt 's behavior was not so "offensive, defamatory or opprobrious as to remove it from the protection of the Act." *Ben Pekin Corp.*, 181 NLRB 1025 (1970), enfd. 452 F.2d 205 (7th Cir. 1971).

Addressing the first factor, we find that the location of Hewitt's conduct weighs in favor of finding his conduct protected. Hewitt's conduct did not take place in a work area and thus it was not disruptive of the work process. Rather, his conduct occurred at a meeting in which Hewitt was acting in a representative capacity on behalf of an employee facing possible discipline. This was an appropriate forum for a union steward to express his views regarding that employee's discipline.

With regard to the second factor, the subject matter of Hewitt's remarks also weighs in favor of protection. Hewitt's outburst clearly involved "terms and conditions of employment" of particular concern to Hewitt as the union steward responsible for protecting a unit employee's rights under the collective-bargaining agreement. His remark was an expression of his view that Cripe was being unfairly suspended.

The third factor, the nature of the employee's outburst, does not weigh against protection. In so concluding, we note that the Act allows employees, pertinently including those like Hewiit who are acting in a representative capacity, some leeway in the use of intemperate language where such language is part of the "res gestae" of their concerted activity. *Thor Power Tool Co*., 148 NLRB 1379, 1380 (1964), enfd. 351 F.2d 584 (7th Cir. 1965).[9] Hewitt's conduct consisted of a single verbal outburst of profane language, in a disciplinary meeting, which was unaccompanied by physical contact or threat of physical harm. His outburst was simply a forceful and momentary expression of his frustration at Foster's refusal to exercise leniency in disciplining Cripe. Here, as in *Max Factor & Co.*, 239 NLRB 804, 819 (1978), Hewitt's conduct "appears to have been spontaneous and was not the product of a conscious decision to degrade [Foster] or to undermine his authority in the eyes of those witnessing the incident."

Finally, with respect to the fourth factor, Hewitt's outburst was not provoked by any unlawful conduct.

In sum, under *Atlantic Steel*, supra, we find the factors of place, subject matter, and nature of the outburst favor protection, while only the factor of provocation does not.[10] Thus, contrary to the judge, we find that Hewitt did not lose the Act's protection when he spontaneously uttered a single profanity. Accordingly, we find that the Respondent violated Section 8(a)(3) in suspending Hewitt for 30 days.

[8] As noted above, the judge seemingly applied *Atlantic Steel* in analyzing what he termed Hewitt's "initial three-day suspension," but *Wright Line* in analyzing the "tacking on another 27 days to Hewitt's suspension." Because we reverse the judge's finding that Hewitt lost the Act's protection at any point, we find it unnecessary to rely on his split treatment of the discipline or his application of *Wright Line*.

[9] In *Thor Power*, supra, an employee-member of a union grievance committee lost his temper during an informal discussion of an employee's grievance and referred to his plant superintendent as "the horse's ass." The employer discharged the employee because of this remark. The Board concluded that the discharge was unlawful. In reaching this result, the Board observed that the remark was "part of the res gestae of the grievance discussion . . . ." 148 NLRB at 1380. Similarly, in *Postal Service*, 250 NLRB 4 (1980), while discussing a possible grievance, an employee acting as union steward allegedly called a supervisor a "stupid ass." The Postal Service suspended the employee for 5 days. The Board found that the remark occurred during the course of protected activity, was part of the res gestae of that activity, and did not lose the protection of the Act. Id. See also *Success Village Apartments, Inc*., 347 NLRB 1065, 1069 (2006) (union shop chairperson's use of crude language toward management during a meeting to discuss an employee warning was not "uncharacteristic of the occasionally intemperate conduct engaged in by both management and union representatives" during such discussions). While he views it to be a close call, Chairman Schaumber agrees that extant Board precedent supports finding that Hewitt's conduct did not lose the protection of the Act. He applies that precedent for institutional reasons. Were he writing on a clean slate, he would find the 30-day suspension to be lawful.

[10] See *Felix Industries*, 339 NLRB 195, 197 (2003), enfd. mem. 2004 WL 1498151 (while the nature of employee's outburst weighed in favor of losing the protection of the Act, it did not outweigh the other three factors favoring the Act's protection and, therefore, employee did not lose the protection of the Act based on his conversation with his supervisor).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Alcoa, Inc., Lafayette, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, disciplining, or otherwise discriminating against employees because of their union or other protected activities.

(b) Refusing and failing to provide the Union with requested information that is relevant and necessary to the Union's performance of its duties as collective-bargaining representative of the Respondent's hourly employees, including the disciplinary records of salaried employees who have committed violations of the Respondent's rules that are comparable to those for which unit employees have been disciplined.

(c) Refusing and failing to provide the Union with requested information that the Respondent deems confidential, without negotiating with the Union to seek an accommodation with regard to such information.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind the unlawful suspension imposed on Mark Hewitt for his conduct on August 4, 2005.

(b) Make Mark Hewitt whole for any loss of earnings or other benefits he may have suffered as a result of the unlawful suspension imposed for his conduct on August 4, 2005. Backpay shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension of Mark Hewitt, and within 3 days thereafter notify him in writing that this has been done and that the unlawful suspension will not be used against him in any way.

(d) Furnish to the Union in a timely manner the information requested by the Union in January 2005, including the disciplinary records of salaried employees who have committed violations of the Respondent's rules that are comparable to those for which unit employees have been disciplined.

(e) Negotiate with the Union in order to seek an accommodation with respect to requested documents not previously provided on the grounds of confidentiality.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Lafayette, Indiana facility, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 4, 2005.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose not to engage in any of these protected activities.

WE WILL NOT suspend, discipline, or otherwise discriminate against employees because of their union or other protected activities.

WE WILL NOT refuse or fail to provide the Union with requested information that is relevant and necessary to the Union's performance of its duties as collective-bargaining representative, including the disciplinary records of salaried employees who have committed violations of our rules that are comparable to those for which unit employees have been disciplined.

WE WILL NOT refuse or fail to provide the Union with information it has requested, which we deem confidential, without negotiating with the Union to seek an accommodation regarding these documents.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind the suspension given to Mark Hewitt for his conduct at a grievance meeting on August 4, 2005.

WE WILL make Mark Hewitt whole for any loss of earnings or other benefits he may have suffered as a result of the suspension imposed for his conduct at a grievance meeting on August 4, 2005, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension of Mark Hewitt, and WE WILL, within 3 days thereafter, inform Mark Hewitt in writing that this has been done and that the suspension will not be used against him in any way.

WE WILL provide to the Union the information requested in January 2005, including the disciplinary records of salaried employees who have committed violations of our rules that are comparable to those for which unit employees have been disciplined.

WE WILL negotiate with the Union in order to seek an accommodation with respect to requested documents not previously provided on the grounds of confidentiality.

ALCOA, INC

Steve Robles, Esq., for the General Counsel.
Marcia A. Mahony, Esq. (Kightlinger and Gray, LLP), of Indianapolis, Indiana, for the Respondent.
Chris Bolte, Staff Representative, of Jasper, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. The first four dockets in this case were tried in Lafayette, Indiana, on February 27–March 1, 2006. The trial resumed on June 6, 2006, to take evidence in Case 25–CA–29860, which I consolidated with the other matters. The charges giving rise to this case were filed between February 7, 2005, and February 6, 2006. A consolidated complaint was issued for the first four dockets on October 28, 2005. The Regional Director issued the complaint in Case 25–CA–29680 on April 7, 2006.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Alcoa, Inc., a corporation, processes aluminum products at its facility in Lafayette, Indiana, where it annually purchases, receives, sells, and ships goods valued in excess of $50,000 directly from or to points outside the State of Indiana. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, United Steelworkers Local 115A, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Alleged Violations Related to Respondent's Change in Policy which no Longer gave Employees an Excused Absence to Attend Monthly Union Meetings

Many of the alleged violations in this case stem from Respondent's decision in the spring of 2005 to cease its practice of allowing employees an excused absence to attend the Union's monthly membership meetings. These meetings were held generally on the third Tuesday of each month. The Union has represented employees at Alcoa's Lafayette plant for decades. The latest collective-bargaining agreement between the Union and Respondent pertaining to this matter was effective from May 31, 2001, until May 31, 2006.[1]

For at least 10 years prior to the Union's June 21, 2005 meeting, employees working on the first shift (7 a.m. to 3 p.m.) were allowed to clock out up to 2 hours early to attend the monthly union meeting, which began at 1:30 p.m. and generally ran about 1-1/2 hours. Employees were not paid for this absence but it did not count against them on their attendance record. Some employees started work early so that they could work an 8-hour shift and attend the union meeting. Prior to June 21, an employee had only to inform his or her supervisor the day of the union meeting that he or she was going to be leaving early, or the day before if he or she was to work a flexible schedule.[2]

[1] The International Union and Alcoa apparently reached agreement on a new master agreement on May 31, 2006.

[2] Respondent may have sent a letter to the Union in May 1998 to the effect that employees are required to get permission to leave the plant early on personal business, Exh. R-30. However, in practice such per-

In the late winter of 2005, Alcoa's management concluded that over 2100-man hours of production were being lost as a result of employees leaving work early to attend the monthly union meeting. As business was picking up dramatically in 2004 and 2005, Respondent apparently decided that this was luxury that it could no longer afford.

On March 8, 2005, Pamela Leonard, the human resources manager for Alcoa's Lafayette operations, and Deborah Spidel, a human resources supervisor, met with Gerald Misner, the union president, and Spencer Buchanan, the Union's vice president. Leonard informed Misner and Buchanan that Respondent was losing 2100-man hours of production due to the fact that employees were leaving work early to attend the union's monthly membership meetings. Leonard asked the Union to provide an alternative schedule, such as holding multiple meetings.

Misner told Leonard that she was "rocking the boat." He also asked Leonard if she wanted to negotiate about such a change. Leonard responded that she did not have to do so.[3] Misner also told Leonard that for many years, Respondent had considered an employee's early departure for union meetings to be an excused absence and that he considered this matter to be part of Respondent's attendance policy. He told Leonard that the Union did not wish to bargain about the matter at this time.[4]

On March 31, 2005, Leonard emailed Misner (GC Exh. 15). She mentioned her March 8, discussion with Misner about "the number of hours the company was excusing employees to attend regular union meetings. At that time I asked you for a proposal on or alternative to shutting down equipment to excuse employees to leave work to attend these meetings."

Misner responded on April 8, by asking for documentation regarding the man hours lost. Leonard responded the same date with a list of equipment that Respondent claims was shut down in order to excuse employees to attend the union meeting on March 15, 2005. At a meeting of April 28, Leonard again asked Misner for a proposal regarding union meetings. Misner responded that the Union's proposal was to leave the union meeting schedule alone. He confirmed this response in writing the next day (GC Exh. 19).

On May 18, Leonard informed Misner that, effective June 1, 2005, regular union membership meetings would no longer be an excused or approved absence. She also reiterated her view that this issue was not a mandatory subject of bargaining (GC Exh. 11). Leonard drafted a notice to employees, dated May 19, informing them that attendance at union meetings would no longer be excused (GC Exh. 2), which she e-mailed to management personnel and asked that they post it in the facility.

Leonard also disseminated "Supervisor Guidelines for Responding to Leave Without Permission" (GC Exh. 5), sometime prior to June 21. These guidelines directed supervisors to tell employees that union meetings were no longer excused absences and that they may be subject to discipline up to and including discharge, if they left early to attend. The guidelines also directed supervisors to stand by each timeclock to give employees a final warning and to keep a record of which employees left the plant. Although not explicit, these guidelines applied only the day of the next scheduled union meeting, June 21, 2005. With a few exceptions for employees whose flexible schedules had been approved in advance, employees were also not allowed to work flexible schedules that day to attend the union meeting.

On June 20, Respondent disseminated a letter under the signature of Plant Manager Robert Morrison reiterating this new policy and informing employees that Morrison had been advised of rumors of a mass walkout.[5] The Morrison letter (GC Exh. 3) advised employees that Respondent may consider leaving the plant without permission on June 21, to constitute insubordination, as well as a violation of the parties' collective-bargaining agreement. In this letter, Morrison informed employees that if they left the plant early without permission to attend the union meeting, they would be subject to discipline up to and including discharge.[6]

Pamela Leonard sent an e-mail to Union President Misner on the afternoon of June 20 asking him to follow the union busi-

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mission was granted routinely. Indeed, there is no evidence that any employee's request to leave early had ever been denied prior to June 21, 2005.

[3] Leonard, in her testimony about the March 8, 2005 meeting did not contradict Misner's testimony on this point (Tr. 444-447). I therefore credit Misner because his testimony is uncontradicted and consistent with Leonard's May 18, 2005 letter (Exh. GC Exh. 11) in which she stated, "Although it [excused absences for union meetings] is not a mandatory subject of bargaining."

Leonard testified Misner told her he was unwilling to negotiate in answer to her counsel's leading question about Leonard's response to Misner. Counsel asked Leonard how Misner responded to "your suggestions and your attempt to negotiate?" (Tr. 447). Although Misner never changed his position regarding the Union's monthly meeting, I find that Leonard told him that Respondent did not have to bargain over this change in policy, did not offer the Union an opportunity to bargain and in fact did not bargain. Respondent offered the Union an opportunity to acquiesce in a change in policy.

[4] Respondent's written attendance policy is Exh. R-7.

[5] The basis for this rumor appears to be a May 19 e-mail from David Musi, Respondent's extrusion plant manager, to Pamela Leonard, Exh. R-31, which recounts a conversation Musi apparently had with employee Jerry Weaver. Respondent introduced this document into evidence through Leonard, rather than through Musi, who had testified earlier.

There is no reliable evidence that Respondent had a reasonable basis for expecting a work stoppage or slowdown on June 21. The contents of Musi's e-mail apparently became a rumor, which in an enhanced form, circulated amongst management personnel (e.g., Tr. 366). This rumor was then communicated to some bargaining unit employees. At no time did Respondent make inquires to the Union as to whether it was planning a "mass walkout" at 11 a.m. on June 21—although Leonard may have mentioned the contents of the Musi e-mail to Misner and Union Vice President Buchanan.

I note that the Musi email is the purest form of hearsay given the fact that Musi didn't testify about his purported conversation with Weaver and the fact that Weaver did not testify. Moreover, the e-mail on its face does not indicate that employees were planning a work stoppage, slowdown or mass walkout. Musi's e-mail suggests merely that employees planning to attend the union meeting would clock out at 11 a.m. rather than 1 p.m.

[6] While the letter read out of context could be interpreted to apply to days other than union meetings days, it was implicitly applicable only to June 21.

ness call-out procedure to enable union executive board and grievance committee chair people to attend the Union's monthly meeting the next day. The Union did not take this suggestion.

On June 21, at least some supervisors warned employees of the potential consequences of clocking out early that day. Some supervisors also stationed themselves by the timeclocks to document which first-shift employees left work early. Five employees did so. Two of these, Mark Hewitt and James Howard, were summoned to a meeting with management officials, including Leonard, on June 23.

Leonard advised Hewitt that she was investigating possible insubordination. She asked him why he left early on June 21. Hewitt told Leonard that he left to run some personal errands and then to attend the union meeting in his capacity as a union official. She made similar inquires to Howard, who told her that he attended to personal errands, but did not attend the union meeting. Respondent did not take any disciplinary action against any first-shift employee for leaving work early on June 21. Approximately 10–12 employees attended the Union's membership meeting that day. On other occasions, 25–60 employees attended.

Analysis

First of all, Respondent was required to bargain over its decision to prohibit employees from taking unpaid leave to attend union meetings. Leave or attendance policies are a term and condition of employment and thus are mandatory subjects of bargaining, *Kendell College of Art,* 288 NLRB 1205, 1213 (1988).

Alcoa had an established practice of allowing employees to take unpaid leave to attend the monthly union meetings. During the life of a collective-bargaining agreement, an employer may not unilaterally change a term or condition of employment, not covered by the agreement, which has become an established practice, *Dow Jones & Co.,* 318 NLRB 574 (1995).[7]

A unilateral change in leave policies is unlawful if it is material, substantial and significant, *Flambeau Arnold Corp.,* 334 NLRB 165 (2001); *Toledo Blade Co.,* 343 NLRB 385 (2004). Given the fact that the Respondent's change in policy prevented union members who wished to attend their monthly union meeting the opportunity to exchange their views regarding the terms and conditions of their employment with all similarly motivated employees from all three shifts, I find that Respondent's unilateral change was material, substantial and significant. Indeed, the facts herein are similar in this regard to *Dow Jones & Co,* supra, in which the Board found that an employer violated Section 8(a)(5) in changing its practice of allowing the union to use its premises for union meetings.

Respondent contends that it bargained to impasse. However, Respondent clearly did not offer the union notice and an opportunity to bargain over the proposed change in leave (attendance) policy. Respondent gave the union notice that it wanted the Union to implement a change in the way it conducted its monthly meetings. Even with regard to this issue, Respondent did not bargain in that it did not offer the Union anything; it merely asked the Union to alter the way meetings were conducted without offering anything in return. More importantly, Respondent did not notify the Union in advance of its intention to prohibit unit employees on the first shift from taking unpaid leave or working a flexible schedule on the day of the union meetings. It simply announced this change on May 18, without notice and an opportunity to bargain.

Respondent violated Section 8(a)(1) as alleged in complaint paragraphs 5(a) and (b), by threatening unit employees with discipline if they left Respondent's facility early on the first shift on June 21, 2005, and by informing employees that it would engage in surveillance, and by engaging insurveillance, to determine who was leaving early on June 21. Respondent also violated Section 8(a)(1), as alleged in paragraph 5(c), by interrogating Mark Hewitt and Jim Howard as to why they left the facility early on June 21 and whether or not they attended the union meeting on that date.

It is uncontroverted that Respondent threatened employees with discipline, up to and including discharge if they left the Lafayette facility early on June 21. It is also uncontroverted that supervisors stood by the timeclocks to discourage employees from leaving and to document who did leave. Since I find that Respondent violated Section 8(a)(5) in unilaterally changing its leave policy to prevent employees from attending the June 21 meeting, I find that all measures it took to enforce that change violated Section 8(a)(1). Similarly, the interrogations of Hewitt and Howard on June 23 violated the Act.

Respondent has defended its conduct in part on the grounds that it had reason to believe that a mass walkout was going to occur on the afternoon of June 21. I find that Respondent did not have a reasonable basis for this belief. This rumor appears to have originated within management and then been shared with some unit employees.

Extrusion Plant Manager David Musi, who did not testify about this rumor, sent an email to Pamela Leonard on May 19, 2005, regarding a conversation with unit employee Jerry Weaver, who was not a witness at this hearing. According to the e-mail (R. Exh. 31),[8] Weaver told Musi that employees would clock out at 11 a.m. rather than at 1 p.m. on union meeting days if Respondent no longer excused employees to attend the monthly union meeting. First of all, the only evidence that Weaver said the above to Musi is classic hearsay and entitled to no weight. Secondly, even on their face, Weaver's statements did not indicate that more employees would leave the plant to attend the Union's monthly meetings that would do so ordinarily. The specter of a "mass walkout" was entirely a figment of management's imagination.

[7] Neither party has alleged that the issue of whether employees were entitled to unpaid leave was governed by the parties' collective-bargaining agreement or by Sec. 8(d) of the Act. The sole basis on which this case was litigated was whether Respondent had implemented a unilateral change with regard to a mandatory subject of bargaining. Alcoa's sole argument is that although it was not required to bargain with regard to any changes it made, it had in fact provided the union notice of the change in policy and an opportunity to bargain with regard to it.

[8] There are two exhibits numbered Exh. R-31 in the record. One received on March 1, 2006; the other on June 6. The Musi e-mail is the Exh. R-31 received on March 1.

Respondent Subcontracts the Total Predictive Maintenance (TPM) work on the 5-inch drive shaft cell in the tube mill

Paragraphs 6(a) and 9 of the complaint allege that Respondent violated Section 8(a)(3) and (1) of the Act by subcontracting the cleaning work associated with a total predictive maintenance (TPM) event scheduled for the 5-inch drive shaft cell in the tube mill. The General Counsel alleges that Respondent violated the Act because the decision to subcontract was discriminatorily motivated. He does not allege a Section 8(a)(5) violation and concedes that the parties' collective-bargaining agreement permits Respondent to subcontract this work. Respondent concedes that this is bargaining unit work.

In the spring of 2005, Respondent planned the first ever TPM event at the Lafayette facility. This work was to entail a comprehensive cleaning, inspection and repair of the 5-inch drive shaft cell in the tube mill. Respondent proposed to use supervisory personnel, including some from other Alcoa facilities to do this work, as well as bargaining unit employees. It asked the Union to agree to this plan.

The Union, by Local President Misner, refused to agree to allow supervisors and other nonbargaining unit employees to perform this bargaining unit work. It proposed that the work, which was scheduled for a weekend, be accomplished by offering bargaining unit employees overtime. In response, Respondent, on April 21, 2005, decided to contract out the work (GC Exh. 17; R. Exh. 29).[9]

Analysis

The General Counsel argues that Respondent violated Section 8(a)(3) and (1) in that it essentially retaliated against the Union for its failure to agree to the use of supervisory personnel in the TPM event. Respondent submits, at page 8 of its brief, that the record establishes a legitimate business purpose for contracting out, i.e., "that bargaining unit employees alone could not do the work without negatively impacting production."

The record, however, establishes no such nondiscriminatory business purpose. Respondent relies completely on the hearsay testimony of Human Resources Director Pamela Leonard. She testified that she first considered contracting out the TPM event when she "realized that the union was not going to be agreeable either to a contractual remedy and at the point where the department manager said we can't do it with the resources we have, you know, we will miss making product and miss shipments if we pull from other areas to bring people in to open it up, open up the overtime. [Tr. 433.]"

Thus, there is no first hand evidence that the decision to contract out the TPM event was due to anything but Respondent's reaction to the Union's refusal to allow supervisory employees to perform bargaining unit work. I thus find that Respondent violated Section 8(a)(3) and (1) as alleged in the complaint.

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action. Once the General Counsel makes this initial showing, the burden of persuasion shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981); *La Gloria Oil & Gas Co.,* 337 NLRB 1120 (2002).

In the instant case, the General Counsel has established that represented employees engaged in protected activity by insisting that bargaining unit work be performed by bargaining unit employees. Respondent was aware of this protected activity and bore animus towards the Union and its officers as a result of their refusal to allow supervisors to perform the TPM work and their refusal to change the schedule for monthly union meetings. In the absence of any alternative motive, I infer that Respondent was motivated by this animus in contracting out the TPM work. Respondent has not established any affirmative defense.

Respondent's Suspension of Mark Hewitt

The General Counsel alleges that Respondent violated Section 8(a)(3), (4), and (1) in suspending Mark Hewitt for 30 days on August 4 and 5, 2005. Mark Hewitt is a crane operator in Respondent's tube mill department. He has worked at the Lafayette plant for 27 years. Hewitt is also the financial secretary of the Union serves on the Union's safety committee and is a steward for the tube mill (Tr. 196).

On the morning of August 4, 2005, bargaining unit employee Kevin Cripe asked Hewitt to represent him at a disciplinary meeting. Hewitt arrived at the meeting after it started. Aside from Cripe and Hewitt, Phyllis Parks, a union tube mill committee person, also attended the meeting. Doug Foster, who is both Cripe and Hewitt's supervisor, and Donald Thomas, the tube mill manager, and Scott Burnett, another Alcoa manager, attended the meeting on behalf of Respondent.

Respondent discussed disciplining Cripe for an incident which started when Supervisor Foster questioned Cripe regarding Cripe's production on a previous day operating the heat treat furnace. Cripe apparently responded by putting his face very close to Foster's and saying something like that is "a stupid fucking question. We're only going to get three or four f—ing loads when we are training new people."[10]

After Hewitt arrived at the meeting, he made a plea for leniency on Cripe's behalf. Foster responded that he thought a suspension was appropriate. Hewitt then pointed at Foster, who was sitting across a table from him and said something like, "if you tell this egotistical f—er to quit talking to people the way

[9] In a meeting with the Union in which the TPM event was discussed, Leonard stated that she would offer the Union the full contract remedy if supervisors were permitted to do some of the TPM work. However, she did not explain the details of what that remedy entailed (Tr. 135, 435–36). What this remedy might be is not readily apparent to this judge from reading the parties' collective-bargaining agreements, Exhs. GC Exhs. 21 and 22.

[10] Neither Cripe nor Foster testified at the instant hearing. I have quoted Plant Manager Donald Thomas' account of the discussion of the incident at the disciplinary meeting. Hewitt may not have been present when the incident was discussed.

he does, this wouldn't happen." Plant Manager Thomas cut Hewitt off and Cripe was given either a 3-day or 5-day suspension.

Later on August 4, Hewitt was called to Thomas' office, where he was given a 3-day suspension for insubordination and abusive and offensive behavior towards a supervisor. Respondent later instructed Hewitt by letter to call Thomas the next day regarding possible further discipline.

On August 5, Hewitt called Thomas, who imposed an additional 27-day suspension for a total of 30 days—without pay. Respondent based the additional 27 days on the fact that Hewitt had a prior offense, resulting in a "one on one" discussion (an oral counseling) on May 5, 2005. At that time, Respondent counseled Hewitt for using the word "f—ing" over the radio, when complaining about the way maintenance employees had attached a motor to his crane. A supervisor told Hewitt that the radio was used by departmental and administrative offices and that was the reason profanity should not be used over the radio. Generally, but not exclusively, Respondent's disciplinary program is progressive. A "one on one" verbal warning is generally followed by a written warning, then a 1-day suspension, a 3-day suspension and further discipline or discharge (GC Exh. 24).

Hewitt served the entire suspension imposed in August. The Union filed a grievance regarding the suspension, which at the time of the hearing was awaiting Respondent's answer in the third step of the grievance procedure.

Analysis

As was the case with the subcontracting of the TPM event, in order to prove a violation of Section 8(a)(3) and (1), the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action. Once the General Counsel makes this initial showing, the burden of persuasion shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

Mark Hewitt was engaged in activity generally protected by Section 7 when he made the remark for which Respondent suspended him. However, he may lose these protections depending on consideration of four factors: (1) the place of the discussion between the employee and the employer; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by an employer's unfair labor practice; *Atlantic Steel Co.,* 245 NLRB 814 (1979); *Trus Joist MacMillan,* 341 NLRB 369 (2004).

After considering these factors, I conclude that Hewitt lost the protection of Section 7, insofar as the initial 3-day suspension is concerned. Taking the last factor first, his outburst was not provoked by an unfair labor practice. It was a response to Supervisor's Foster's insistence on a 3-day suspension for Kevin Cripe, which has not been shown to violate the Act in any way. Secondly, the other three factors cut against Hewitt. His outburst was gratuitous and took place in a grievance hearing which concerned the alleged insubordinate use of profanity by Cripe towards Foster, both of whom were present at the meeting. Foster was not only Cripe's supervisor, but also Hewitt's supervisor. Given this context, Hewitt's comment would tend to undermine Foster's authority and detract from the message being conveyed to Cripe as to the change in his behavior called for by the discipline imposed upon him.[11] I therefore conclude that Respondent did not violate the Act in suspending Hewitt for 3 days.

On the other hand, however, I find that Respondent did violate the Act in tacking on another 27 days to Hewitt's suspension. Respondent was well aware of Mark Hewitt's union activities, which included not only his representation of Kevin Cripe on August 4, but also his position as the Union's financial secretary, safety committee person and tube mill steward (Tr. 57, 196). Further, Respondent's animus towards Hewitt's union activities is established by its interrogation of him on June 23, 2005, regarding his reason for leaving the plant early on June 21, to attend the monthly union meeting.

I also infer that the additional 27 days suspension was motivated by Respondent's animus towards the Union and Hewitt's union activities in particular. I draw this inference from the fact that Respondent ignored the normal progression of its disciplinary procedure by adding the 27 days, without any satisfactory nondiscriminatory explanation for doing so.

Respondent issued Hewitt a formal discipline report on May 6, 2005. On the previous day, Hewitt was unhappy with the way in which a maintenance crew had hooked a motor to his crane. He used the word "f—ing" as an adjective over the plant radio. Respondent imposed a "one on one" discussion in part because the radio is used in Alcoa's administrative offices. There is no indication that Hewitt directed his profanity at any individual.

Respondent's formal discipline report form indicates that normally a "one on one" discussion is followed by a written warning, a 1-day suspension and a 3-day suspension before Respondent imposes a 3-day plus 27-day suspension. Alcoa has offered no explanation as to why Hewitt's prior offense, a far less serious matter, warranted the imposition of an additional 27-day suspension for his outburst on August 4.

On the other hand, the record is replete with evidence of animus towards the Union at this time and towards Hewitt's union activities in particular—most notably his leaving work early on June 21 to attend the monthly union meeting. I find that but for the Respondent's animus towards the Union and Hewitt emanating from the controversies surrounding the June 21 union meeting as well as the "fallout" from the TPM event, it would not have imposed the additional 27-day suspension. I, therefore, find that Respondent violated Section 8(a)(3) and (1) in this regard.[12]

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[11] By way of contrast, the alleged discriminatee in *Felix Industries,* 331 NLRB 144 (2000); 339 NLRB 195 (2003) on remand), made his comments to a supervisor on the telephone and thus no other employees heard or observed his statement. The Board found therefore that the discriminatee's comments did not have any direct impact on workplace discipline.

[12] Respondent, in its brief, overlooks and ignores the fact that the Union alleged a violation of Sec. 8(a)(3) and (1) in its charge and that

Union Information Requests

Complaint paragraphs 7 alleges that Respondent violated Section 8(a)(5) in refusing to provide information requested by the Union in January 2005 which the General Counsel and Union allege are relevant and necessary to the Union's duties as collective-bargaining representative for unit employees.

Paragraph 7(d) concerns grievance T & D[13] 02-04 filed on behalf of unit employee Kevin Marsell, who apparently had been disciplined for an alleged drug offense. On January 17, 2005, the Union requested a chain of custody form for Marsell's drug tests and a copy of all test results for the last 2 years in which Lifeloc Technologies was involved in testing any Alcoa employee at Lafayette. On February 18, 2005, Respondent, by Human Resources Supervisor Debby Spidel, informed the Union that it needed a release from Marsell for the chain of custody form pertaining to his tests and that it would not provide any test data for any other employee without a release. Since February 18, Respondent has changed its policy and no longer requires a release for medical records pertaining to the grievant. The Union received the chain of custody documents in May 2005.

Complaint paragraph 7(e) concerns information requests made by the Union in connection with the processing of grievance on behalf of unit employee Troy Jones. Respondent sent Jones for drug tests on several occasions. The Union asked for documentation as to whether Jones had been paid for the time that he was being tested. Alcoa sent the Union time and attendance records indicating that Jones did not lose any time, but it did not send the Union copies of its payroll register, which showed what Jones was actually paid (R. Exh. 27; Tr. 426–427). However, an employee's pay is based on the timeclock readings that were provided to the Union.

Paragraph 7(f) relates to an information request filed in connection with grievance LR 17-04, concerning unit employee Duane Lord. Among the documents requested were alcohol test results for any employee in which the result was .001 or higher and the copies of documentation of any discipline that was administered as a result of such tests. The Union indicated that it believed such documentation existed for two individuals, one of whom was Jeffrey Suralt. Respondent, on February 18, 2005, informed the Union that it would not provide testing information without a signed release from each employee identified and in any event would not provide information regarding Suralt, who it asserts is a salaried employee (R. Exh. 18).

Paragraph 7(g) relates to grievance Ext. (extrusion) 27-04, filed on behalf of unit employee Darrell Weathers. Weathers was disciplined for violating Respondent's lockout procedure and thus exposing himself to a very serious safety hazard. The Union asked for information regarding discipline for nonunit employees, Dick Wilson and Kathy South (alleged lockout-tag out violations) and Human Resources Supervisor Debby Spidel (an alleged failure to comply with Respondent's safety rule regarding the wearing of safety glasses). The Company responded by acknowledging that its safety rules applied to all employees, but that the Union was not entitled to information regarding discipline taken or not taken with regard to salaried employees.[14] Eventually, Respondent provided the information regarding Kathy South to the Union.

Complaint paragraph 7(h) relates to an information request concerning grievance LR-16-04, which was filed on behalf of Steve Niece, an employee who was terminated for missing work 6 consecutive days without leave. The Union asked that Respondent verify the attendance record of another employee, Kimberly Olands and to verify whether she was on Family Medical Leave Act (FMLA), or any other type of leave, anytime between June 17 and 30, 2004. It also asked for information indicating the reason(s) why Respondent denied Niece leave for June 14–18 and 21, 2004.

On February 25, 2005, Respondent informed the Union that Kimberly Orland's attendance record was provided on February 4, and that this record was accurate. The Union contends that it received conflicting records regarding Orland's attendance and that Respondent never clarified which records were correct.

Respondent also informed the Union that it needed a release to give it any of Niece's medical information. Apparently, sometime after February 25, Respondent decided that it did not need a release to provide the Union the grievant's medical information, but the Union contends that it did not have any information relating to the reasons for which Niece was denied leave. Respondent contends that the information provided to the Union answers this inquiry in that it contains a note from Niece's physician indicating that he was able to work on the days in question.

Case 25–CA–29860: This case involves oral requests by the Union in January 2006, which were followed up by written requests asking for specific information regarding disciplinary measures Respondent took against two supervisory employees, Mike Howe and Theresa Spitznagel.

Supervisor Mike Howe was approached by Robert Branstetter, a bargaining unit employee. I assume this occurred sometime during 2005. Branstetter alleged that Howe was performing bargaining unit work. After some discussion, Howe told Branstetter to "get the f–ck out of here."

On another occasion, I assume in 2005, Supervisor Theresa Spitznagel grabbed the sleeve of bargaining unit employee Jerry Barnett and said something like, "[D]on't you walk away from me."

Respondent has been willing to inform the Union only that it took corrective action with regard to these incidents. It has refused to respond to the Union's requests for specific information as to the manner in which these supervisory employees were disciplined.

The Union alleges that this information is relevant to its ability to process grievances, particularly those of bargaining unit employees Mark Hewitt, Kevin Cripe, and Curtis Bray. As discussed earlier, Hewitt was suspended for 30 days for calling

the General Counsel alleged that Hewitt's suspension violated Sec. 8(a)(3) and (1) in the complaint. The General Counsel did not proceed exclusively, or even primarily, on the theory that Hewitt's suspensions violated Sec. 8(a)(4) and (1).

[13] Signifying that the employee works in the tool and die department.

[14] The Company's refusal to provide Wilson's records on February 4, 2005, appears to be the earliest violation of Sec. 8(a)(5) in this matter, Exh. R-10.

a supervisor "an egotistical f—er" during a grievance meeting regarding Cripe. Cripe was suspended for 3 days for telling his supervisor that his inquiry was the stupidest f—ing question he'd ever heard. Bray was suspended for 3 days for telling his supervisor, Jennifer Vandergrift, that "he would mess with her, if she messed with him."[15]

The Union contends the information regarding the discipline meted out to Howe and Spitznagel is relevant to the Hewitt, Cripe, and Bray grievances in assisting them in determining whether the bargaining unit employees are being treated disparately when compared to salaried employees. Respondent contends that supervisory discipline is not relevant because it has means available for correcting supervisor conduct, i.e., denying promotions that are not available in correcting the conduct of bargaining unit employees. Additionally, Respondent argues that to give the Union specific information regarding the discipline imposed on supervisory personnel would undercut the supervisor's authority in managing the workplace.

Analysis

Generally Applicable Principles

When a collective-bargaining representative seeks information from an employer regarding matters pertaining to bargaining unit employees, the request is presumptively relevant and the employer generally has a duty to provide such information. However, when a union seeks information concerning matters outside the bargaining unit, the union is required to make a showing of relevancy and necessity. However, the burden of establishing relevancy and necessity is not an exceptionally heavy one. The union must show a probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities, *Frito-Lay, Inc.,* 333 NLRB 1296 (2001).

In the instant case, the Union made it clear to Respondent that it sought the disciplinary records of salaried employees in order to determine whether certain unit members were being treated in a disparate manner. Since Respondent concedes that its salaried employees are held to the same standards of conduct as unit employees, the Union has met its burden of showing relevancy and necessity with respect to those salaried employees who committed comparable offenses to those for which unit employees were disciplined, *Holiday Inn on the Bay,* 317 NLRB 479, 482 (1995).

In dealing with union requests for relevant but assertedly confidential information, the Board is required to balance a union's need for the information against any legitimate and substantial confidentially interest established by the employer. However, an employer possessing the information and refusing to disclose it on confidentiality grounds has a duty to seek an accommodation through the bargaining process, *Exxon Co. USA,* 321 NLRB 896 (1996). The burden of formulating a reasonable accommodation is on the employer; the union does not need to propose a precise alternative to providing the requested information unedited, *Borgess Medical Center,* 342 NLRB 1105 (2004). Potential avenues for accommodation include redaction of confidential information and protective orders.

Unreasonable delay in furnishing information relevant to the processing of grievances and contract negotiations is as much a violation of the Act as a refusal to furnish any information at all, *Bundy Corp.,* 292 NLRB 671 (1989). The record herein establishes that much of the information requested by the Union in January 2005 was furnished to it by Respondent in May 2005, after Respondent initially refused to furnish this material. Since the General Counsel did not litigate this matter on a theory of unreasonable delay and because I have no basis, on this record, for determining whether or not the delay was unreasonable, I dismiss all the complaint items relating to information that was furnished in May 2005.

Principles Applied to the Facts Herein

I dismiss paragraph 7(d) of the complaint relating to the Union's request for the chain of custody documents relating to Kevin Marsell on the grounds that they were provided in May 2005. It is unclear from this record whether or not Respondent has provided tests results for other employees. If it has not done so, I will order Respondent to furnish the Union with these results and negotiate to seek an accommodation with the Union if it claims that these results are confidential.

Regarding paragraph 7(e) I find a violation and will order Respondent to provide the Union with copies of its payroll register so that the Union can be certain as to what Troy Jones was actually paid.

I find that Respondent violated the Act as alleged in complaint paragraph 7(f). It has not sought an accommodation with the Union regarding the test results of employees whose tests for blood alcohol were .001 or higher and the disciplinary records of salaried employee Jeffrey Suralt may well be relevant to the issue of whether grievant Duane Lord was disparately disciplined.

With regard to paragraph 7(g), I find a violation with regard to the disciplinary records of Dick Wilson, but not with regard to Debby Spidel. The Union sought the disciplinary records of these two salaried employees to compare them with the discipline of unit employee Darrell Weathers. Wilson's and Weathers' violations both involve Respondent's lockout procedure, a very important safety matter, also covered by Occupational Safety and Health Administration (OSHA) regulations. Wilson's disciplinary record may be relevant to determining whether Weathers was treated disparately in comparison. Spidel's records have not been shown to be relevant. She apparently failed to wear safety glasses, an offense not relevant to the discipline meted out to Weathers.

I affirm the violation alleged in paragraph 7(h). Respondent will be ordered to produce all records requested which may bear upon the question as to whether unit employee Steve Niece was treated disparately when compared to Kimberly Olands. If Respondent maintains that anything in Olands' records is confidential, it must negotiate an accommodation with the Union, for example, a possible redaction of confidential information.

[15] Respondent has offered to settle the Cripe, Hewitt, and Bray grievances. The Union has not accepted Alcoa's offers and all three matters are pending arbitration. On April 25, 2006, 3 months after the third-step grievance meeting at which Bray's suspension was discussed, Respondent offered to reduce his discipline to a written warning.

Regarding Case 25–CA–29860, I find that Respondent violated Section 8(a)(5) in refusing to furnish the Union the disciplinary records of salaried employees Mike Howe and Theresa Spitznagel. Howe's offense, i.e., telling a unit employee to "get the f–ck out of here," may be useful to the Union in its arbitration of the Cripe, Hewitt, and Bray grievances. Particularly since Hewitt's punishment, even if reduced to 3 days, is predicated on his prior offense of using the word "f–ck" over the radio, the discipline imposed upon Howe may be relevant to his arbitration.

Sptiznagel's discipline, similarly, may be relevant to the discipline imposed upon unit employee Curtis Bray, who was first given a 3-day suspension, later reduced to a written warning, for allegedly threatening and/or being insubordinate to Supervisor Jennifer Vandergrift.

SUMMARY OF CONCLUSIONS OF LAW

Respondent, Alcoa, Inc., at its Lafayette, Indiana facility, violated Section 8(a)(5) and (1) of the Act by unilaterally changing its leave policy to prohibit unit employees from taking unpaid leave to attend monthly union meetings.

Respondent violated Section 8(a)(1) of the Act by threatening employees with discipline if the left Respondent's facility early on June 21, 2005; in informing employees that Respondent would engage in surveillance to determine who was leaving early on that date and by engaging in such surveillance on June 21.

Respondent violated Section 8(a)(1) on June 23, 2005, by interrogating unit employees Mark Hewitt and Jim Howard as to the reasons for which they left the Lafayette facility early on June 21.

Respondent violated Section 8(a)(3) and (1) of the Act in contracting out the TPM event at the facility in April 2005 in order to retaliate against the Union's insistence that bargaining unit employees perform bargaining unit work.

Respondent violated Section 8(a)(3) and (1) of the Act in suspending Mark Hewitt for an additional 27 days for his comments at the August 4, grievance meeting.

Respondent violated Section 8(a)(5) and (1) of the Act in failing to provide the Union with the following information:

> All drug test results not previously provided as requested in connection with grievance T & D 02-04;
>
> All records not previously provided that were requested by the Union in connection with grievance LR 17-04, including disciplinary records regarding Jeffrey Suralt;
>
> Payroll register documents pertaining to Troy Jones, as requested by the Union;
>
> Disciplinary records pertaining to salaried employee Dick Wilson's violation of Respondent's lock-out/tag-out rules;
>
> All records relating to the treatment of Kimberly Olands, as compared to grievant Steve Niece and any documents not previously provided regarding the reasons for which Niece was denied leave;
>
> Disciplinary records previously requested regarding salaried employees Mike Howe and Theresa Spitznagel.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]